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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: APR 29 2009

LIN 07 003 51787

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Marie Johnson

Z John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center denied the employment-based immigrant visa petition. The director also denied the petitioner's motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in the arts. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority Workers. – Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) Aliens with Extraordinary Ability. – An alien is described in this subparagraph if –
> >
> > > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
> > >
> > > (iii) the alien's entry to the United States will substantially benefit prospectively the United States.

As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

This petition seeks to classify the petitioner as an alien with extraordinary ability as a fine artist. The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, internationally recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. A petitioner, however,

cannot establish eligibility for this classification merely by submitting evidence that simply relates to at least three of the criteria outlined in 8 C.F.R. § 204.5(h)(3). In determining whether the petitioner meets a specific criterion, the evidence itself must be evaluated in terms of whether it is indicative of or consistent with sustained national or international acclaim. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2).

The petitioner has submitted evidence that, he claims, meets the following criteria.[1]

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

In his September 1, 2006 letter accompanying the petition,[2] prior counsel indicated that the petitioner had won the "JACA Grand Prize (Japanese Visual Art Exhibition 1997)." In denying the petition, the director stated that the record did not "establish the significance of the beneficiary's award." The record, however, does not contain any evidence of this award, and the petitioner does not pursue the issue on appeal.

The record does not establish that the petitioner meets this criterion.

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

To demonstrate that membership in an association meets this criterion, the petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or work experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues do not satisfy this criterion as such requirements do not constitute outstanding achievements. The overall prestige of a given association is not determinative. The issue is membership requirements rather than the association's overall reputation.

The petitioner submitted a March 31, 2003 letter from the Japanese Artists Association of New York, Inc. (JAANY), certifying that he had been a member of the organization since 2003. The petitioner also submitted a copy of a document that purports to be his membership certification in the Japan Afro-Asia-Latin American Artist Association JAALA. However, the translation accompanying this document does not identify the translator and the translator does not certify that he or she is competent to translate from Japanese into English, as required by 8 C.F.R. § 103.2(b)(3), Furthermore, the petitioner submitted no evidence that a condition of membership.

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[1] The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

[2] Different counsel represented the petitioner during the initial stages of this proceeding. Previous counsel will be referred to as prior counsel in this decision.

In response to the director's request for evidence (RFE), the petitioner submitted a July 25, 2007 letter from the founder of JAANY, which stated:

> Jaany has [a] very rigorous standard for membership. We have many professional artists seeking membership to our association each year. Requirements for membership are rigorous by any standard. They include a demonstration of professional status, a peer review requiring 90% acceptance by the entire body of our professional artist members[.] In addition, we accept only artist who has future plans of his/her art activities in this country.

In support of the motion, the petitioner submitted a copy of the application for membership in JAANY, which requires the applicant to submit a statement and "20 slides" of the applicant's work as well as make a "brief speech." Counsel asserts that this is evidence of the outstanding achievement required for membership in the organization.

Nonetheless, a "rigorous" membership standard is not the same as requiring outstanding achievement as a condition of membership. Nothing in the documentation submitted establishes that a potential member of JAANY must demonstrate outstanding achievement as opposed to completion of "20 slides" of work and a "professional status."

The petitioner submitted no other documentation about his membership in JAALA.

The evidence does not establish that the petitioner meets this criterion.

> *Published materials about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.*

In order to meet this criterion, published materials must be primarily about the petitioner and be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national distribution and be published in a predominant language. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of a significant national distribution.

The petitioner submitted several documents that appear to be articles from various media, identified by the petitioner to include *The Asahi Times* and the *Tokyo Times*. However, the petitioner failed to submit certified translations of these documents and therefore the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

Other documentation included an article from the websites of Associated Content and Asian Social Network, both about the petitioner's exhibit of his works at the gallery, Susan Eley Fine

Art. However, the petitioner submitted no documentation that either of these media is considered major media or a major trade publication.

With his motion, the petitioner resubmitted two of the documents previously submitted, accompanied by English translations. We note first that the documents do not identify the translator, and the translator did not certify that the translation was complete and accurate and did not certify that he or she is competent to translate from the foreign language into English. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and is of no evidentiary value in this proceeding.

The record does not establish that the petitioner meets this criterion.

> *Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.*

The petitioner did not initially allege that he meets this criterion. However, on motion, counsel stated that the petitioner "is a prominent member of JAANY and also part of the selection committee to judge new applicants to JAANY." Counsel references the July 25, 2007 letter from the founder of JAANY in which he stated that the entire membership votes on new members.

The regulatory criteria are established to assist the petitioner in demonstrating national or international acclaim, and must be interpreted as a whole with the statute. Not all who sit as a judge will have extraordinary ability or will qualify under this criterion. The AAO interprets this regulation to require that the selection and participation process for serving as the judge of the work of others in the field be indicative of national or international acclaim in the field. The evidence does not establish that the membership of JAANY is based on outstanding achievement of its members, and thus the petitioner's evaluation of new members, along with every other member of the organization, does not indicate that he does so because of his national or international acclaim.

The petitioner has not established that he meets this criterion.

> *Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.*

To establish that he meets this criterion, the petitioner submitted letters of recommendation attesting to his talents and creativity as an artist. The petitioner is described as "a gifted artist" and "an artist of the highest ability and talent" whose work is "very striking and creative." Others who commented included:

- [redacted], director of the Hyundai gallery in Seoul, Korea, who stated that the petitioner "has provided a new style in the installation field that is most appropriate[] for his visionary themes."

- a professor in the College of Fine Arts at Sungshin Women's University, who stated that the petitioner "has excellent talent and his abilities of expression and description are inventive."

- founder of CoenAssociates, who stated that the petitioner's "paintings have an [sic] unique style and he has the strength to create original work."

- Executive Director of Motoazabu Gallery in Tokyo, Japan, who stated that the petitioner's "unique and remarkable work impresses me as extraordinary."

However, none of those who attested to the petitioner's ability indicated that his work constituted a contribution of major significance to art.

The evidence does not establish that the petitioner meets this criterion.

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

The petitioner submitted documentation establishing that his work has been exhibited in several galleries and artistic exhibitions. We concur with the director that the petitioner meets this criterion.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

To meet this criterion, the petitioner must show that he performed a leading or critical role for an organization or establishment and that the organization or establishment has a distinguished reputation.

In his September 1, 2006 letter accompanying the petition, prior counsel asserted that the letters of recommendation submitted by the petitioner was evidence of this criterion. The authors of the letters are primarily other artists, curators or directors of art galleries, who attest to the petitioner's ability as an artist. They provide no information that the petitioner worked in a leading or critical role for any organization.

In a March 20, 2003 letter, [redacted], president of the art group Wakoukai, stated that the petitioner taught oil painting and watercolor for the group. Other documentation indicates that the petitioner worked as a volunteer at the Museum of Modern Art in New York, as a teacher at the Council Senior Center, and a special lecturer at Nippon University. None of the documentation, however, establishes that the petitioner served in a critical or leading role for these organizations and, other than the Museum of Modern Art, nothing in the record indicates that these organizations enjoy a distinguished reputation.

On motion, counsel asserts that the petitioner meets this criterion as a director and member of the board of JAANY and as a "member of the Committee in JIAC [Japan International Artist Club], a prominent organization hosting annual exhibition at the prominent Tokyo Metropolitan

Museum." However, the petitioner submitted no documentation to establish that his position as a member of JAANY or JIAC was in a critical or leading role or that these organizations enjoy distinguished reputations.

The evidence does not establish that the petitioner meets this criterion.

Other comparable evidence.

The regulation at 8 C.F.R. § 204.5(h)(4) states: "*If the above standards do not readily apply to the beneficiary's occupation*, the petitioner may submit comparable evidence to establish the beneficiary's eligibility." [emphasis added]. The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner's occupation cannot be established by the ten criteria specified by the regulation. However, we will briefly address other evidence the petitioner submitted under this provision.

Both counsel and prior counsel refer to the petitioner's community involvement as evidence of his extraordinary ability. However, the petitioner's role as a community organizer or volunteer does not provide evidence of his sustained acclaim in his area of expertise. Counsel also refers to the letters of recommendation written on behalf of the petitioner. However, these letters have been considered under the criterion discussed above, and do not serve as an independent means of establishing the petitioner's sustained national or international acclaim as an artist.

Counsel asserts that based on prior decisions of the AAO, these letters written by "expert witnesses [who] are highly placed within their fields" carry "considerable weight and can be enough to overcome other weaknesses in a petition." We note first that the case cited by counsel is unpublished. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Second, the letters submitted on behalf of the petitioner are not sufficient in and of themselves to overcome the deficiencies in the petitioner's evidence. Further, although the writers attest to the petitioner's skills as an artist, none indicate that the petitioner has reached the top of his profession.

Documentation in the record indicates that the petitioner has a previously approved petition as an alien with extraordinary ability under section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i). While USCIS has approved an O-1 nonimmigrant visa petition filed on behalf of the beneficiary, that prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude

USCIS from denying an extension of the original visa based on a reassessment of the beneficiary's qualifications).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director has approved a nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of his field of endeavor. The conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor.

The evidence indicates that the petitioner is not persuasive that the petitioner's achievements set him significantly above almost all others in her field. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.